IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.R.No.4606 of 2006
Date of decision : 03.10.2007

Krishan Kumar

… Petitioner

Versus

Civil Judge (Jr.Divn.) Hansi and others

…Respondents

Present : Mr.Bhoop Singh, Advocate for the petitioner
Mr.Amit Jain, Advocate and
Mr.Arun Jain, Advocate for respondent No.2.

Mr.Divay Sarup, Advocate for respondents No.3 to 5, 8 and 10.

Vinod K.Sharma, J. (Oral)

By way of present revision petition, challenge is to the order dated 8.8.2006 passed by the learned Civil Judge (Jr.Divn.) Hansi acting as Election Tribunal (for short 'Tribunal') vide which an application moved by respondent No.2-election petitioner under Section 176(4)(b) of the **Haryana Panchayati Raj Act, 1994** (hereinafter referred to as the 'Act') has been allowed and learned Tribunal has been pleased to order the recount of votes. Respondent No.2-election petitioner filed an election petition under Section 176 of the Act for setting aside the election of the petitioner-herein as Sarpanch of village Umra, Tehsil Hansi, District Hisar which was held on 3.4.2005, and for declaring petitioner-herein to be disqualified for the purpose of election with a consequential relief that the election-petitioner be declared as duly elected Sarpanch of village Umra as largest number of valid votes were polled in his favour in the election held on 3.4.2005.

In the application, it was pleaded that election to the post of Sarpanch was held on 3.4.2005 and immediately after polling, the counting was held in the premises of Govt. Senior Secondary School for Boys, Umra by the Assistant Returning Officer (Panchayat) and the election petitioner was

declared winner by one vote. The petitioner-respondent No1 was not satisfied with the counting of votes and therefore, he applied for recounting of votes which was held on the next day i.e. 4.4.2005 at 3:00 p.m. It was pleaded that on 4.4.2005 and at the time of recounting, many anti social elements as well as some Advocates were present inside the counting hall on behalf of the petitioner-herein and sensing foul play by these people, a complaint was made to the Returning Officer (Panchayat) but he has not taken any action in this regard.

It was claimed that on 3.4.2005 after completion of counting of votes when the election petitioner was declared elected by one vote by the Assistant Returning Officer, the petitioner-herein and his supporters did not allow the Assistant Returning Officer to declare result of the counting and to issue the certificate to the election petitioner, They closed the gate from inside hall and opened the same only after the Assistant Returning Officer assured them that recounting shall be carried out on the next day. It was claimed that at the first time, election petitioner has secured 1451 votes as per the details given by the Assistant Returning Officer while petitioner-herein had secured 1450 votes. It was claimed that the concerned Assistant Returning Officer did not count about 50 valid votes in favour of the election petitioner and further included about 50 invalid votes in favour of petitioner-herein in the first counting as well as in the recounting of the votes.

It was claimed that the conduct of Assistant Returning Officer (Panchayat) was published in the various news papers on 4.4.2005 and in this way, prayer was made to scrutinize and compute the votes recorded in favour of each candidate and declare the candidate who is found to have secured largest number of valid votes in his favour to have been duly elected as provided under Section 176(4) (b) of the Act.

The application was contested by the petitioner-herein on the ground that the election-petitioner (respondent No.2 herein) has not laid down any firm foundation for securitization and computing the votes recorded by him and the election petitioner for obtaining an order for recounting must lay down firm foundation and establish a strong prima facie case for the purpose of recount.

It was pleaded that perusal of the pleadings of the parties establish the fact that there was no prima facie case in favour of the election petitioner what to say of strong case and the claim of the election petitioner was misconceived and unsustainable in the eye of law and therefore, it was claimed that application be dismissed.

Respondents No.5 to 8 in the election petition adopted reply filed on behalf of respondent No.1, whereas, respondents No.2 to 4, 7 and 9 did not oppose the application moved by the election petitioner-(respondent No.2).

The learned Tribunal disposed of the application by observing that from the pleadings of the parties, the fact which arises is that the election-petitioner has lost the election to the petitioner-herein by a margin of only single vote. It was also observed that after the counting of votes on 3.4.2005, he was declared winner by one vote by the concerned Assistant Returning Officer. It was only due to the objections raised by the petitioner-herein and his supporters that result was not declared and the requisite certificate was not issued. It was claimed that it was under the pressure that declaration was made that recounting was to be carried out on the next day. The learned Tribunal took a note of para 2 of the application made by the petitioner-herein for recounting which reads as under:-

> "That at the counting of ballet papers polled in booth No.203 it was found that the total votes polled and ballot issued were 498 but the actual physical count showed that 494 ballot papers only

were recovered from the ballot box and at the end of the total counting the applicant is shown as loosing the election by a margin of one vote. Hence, the election is materially affected by this irregularity, which requires to be rectified first before the count."

In view of the averments made, the learned Tribunal came to the conclusion that petitioner-herein had admitted that he was a losing candidate by margin of one vote which is in consonance with the news item published in the various news papers and therefore, a presumption was drawn that it was the election-petitioner who was declared elected on 3.4.2005. It was after the recounting that petitioner-herein was declared to be a winner candidate despite objections having been raised on behalf of election-petitioner in this regard. Learned Tribunal noticed the provision of Section 176 of the Act which read as under:-

"176. Determination of validity of election enquiry by judge and procedure.-(1) if the validity of any election of a member of a Gram Panchayat, Panchayat Samiti or Zila Parishad or Sarpanch of Gram Panchayat, Chairman or Vice-Chairman, President or Vice-President of Panchayat Samiti or Zila Parisahd respectively is brought in question by any person contesting the election or by any person qualified to vote at the election to which such question relates, such person may at any time within thirty days after the date of the declaration of results of the election, present an election petition to the civil court having ordinary jurisdiction in the area within which the election has been or should have been held, for the determination of such question.

(2) A petitioner shall not join as respondent to his election petition except the following persons:-

(a) Where the petitioner in addition to challenging the validity of the election of all or any

of the returned candidates claims a further relief that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner and where no such further relief is claimed, all the returned candidates;

(b) any other candidate against whom allegations of any corrupt practices are made in the election petition.

(3) All election petitions received under sub-section (1) in which the validity of the election of members to represent the same electoral division is in question, shall be heard by the same civil court.

(4)(a) If on the holding such inquiry the civil court finds that a candidate has, for the purpose of election committed a corrupt practice within the meaning of sub-section (5), he shall set aside the election and declare the candidate disqualified for the purpose of election and fresh election may be held.

[aa] If on holding such enquiry the Civil Court finds that-

(i) on the date of his election a returned candidate was not qualified to be elected;

(ii) any nomination has been improperly rejected; or

(iii) the result of the election, in so far as it concerns a returned candidate, has been materially affected by improver acceptance of any nomination or by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with or violation of the provisions of the Constitution of India or of this Act, or any rules or orders made under the Act,

election of such returned candidate shall be set aside and fresh election may be held.]

(b) If, in any case to which [clause (a0 or clause (aa)] does not apply, the validity of an election is in dispute between two or more candidates, the court shall after a scrutiny and computation of the votes recorded in favour of each candidates, declare the candidates who is found to have the largest number of valid votes in his favour, to have been duly elected:

Provided that after such computation, if any, equality of votes is found to exist between any candidate and the addition of one vote will entitled any of the candidates to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in the favour of such candidate or candidates, as the case may be, elected by lot drawn in the presence of the judge in such manner as he may determine.

(5) A person shall be deemed to have committed a corrupt practice-

(a) who with a view to induce a voter to give or to refrain from giving a vote in favour of any candidate, offers or gives any money or valuable consideration, or holds out any promise of individual profit, or holds out any threat of injury to any person; or

(b) who, with a view to induce any person to stand or not to stand or to withdraw or not to withdraw from being a candidate at an election offers or gives any money or valuable consideration or holds out any promise or individual profit or holds out any threat of injury to any person; or

(c) who hires or procures whether on payment of otherwise, any vehicle or vessel for the conveyance of any voter (other than the person himself, the members of his family or his agent) to and from any poling station."

However, it may be noticed that in the impugned order Section 176 (4)(aa) of the Act was not reproduced. (Amended provision was not noticed which seems that reproduction from old Act). Learned Tribunal thereafter observed that the petitioner has given up all the grounds except one under Section 4(b) to challenge the election of petitioner-herein and after taking note of the different authorities, the learned Tribunal allowed the application moved by the petitioner by observing as under:-

> "In view of the facts and circumstances of the case as well as law laid down in this regard, the application in question is accordingly allowed in the interest of justice and the recounting of the votes shall be done in the court on dated 8.9.2006. The requisite election record is accordingly also ordered to be summoned from the concerned authorities well before the date."

Mr. Bhoop Singh, learned counsel appearing on behalf of the petitioner has challenged the order firstly on the ground that the impugned order is based on reading of un-amended Section 176 and therefore, the Tribunal failed to take note of the amendments made in Sections 176(4) (aa) and Section 176(4)(b) of the Act. The contention of learned counsel for the petitioner herein was that after amendment of Section 176, it is not open to the Tribunal to order the recounting without holding such enquiry which could be done only after the parties were allowed to lead their evidence and form the basis for recount. In support of his contention, he placed reliance on the judgment of this Court in **Civil Writ Petition No.5814 of 2006** titled as **Ved Pal vs. The Additional Civil Judge and others** decided on 22.5.2006 which reads as under:-

"This writ petition impugns as order dated 10.4.2006 passed by learned Additional Civil Judge (Sr.Divn.), Guhana in case No.153 of 2005 in an election petition under Section 176 (4)(b) of the Haryana Panchayati Raj Act, 1994 (for short 'the Act'). Undisputedly, in exercise of the powers under the aforesaid provisions, the Tribunal was to hold an enquiry. It appears that during the course of enquiry, keeping in view a Full Bench Judgment of this Court on the said provision in the matter of **Radha Kishan Versus The Election Tribunal-cum-Sub Judge, Hisar 1999 (4) RCR (Civil) 79,** the order for re-counting has been passed just after recording the evidence of the petitioner. We do not notice any document to substantiate that the provisions of Rule 69 of the Haryana Panchayati Raj Rules 1994, were adhered to by the respondent. Moreover, we would like to add that after judgment of the Full Bench of this Court, a new provision being 176(4)(aa) (by way of Haryana Act 17 of 2001 dated 18.12.2001 has been incorporated in the Act. The provisions of the said clause on reproduction read as under:-

(aa) If on holding such enquiry, the Civil Court finds that-

(i) on the date of his election a returned candidate was not qualified to be elected.

(ii) any nomination has been improperly rejected; or the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper acceptance of any nomination or by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with or violation of the provisions of the Constitution of India or of this Act, or any rules or orders made

under this Act, election of such returned candidate shall be set aside and fresh election may be held.

One of the grounds available under the said provision is the refusal or rejection of any vote. In this case also, a similar ground has been taken in regard to rejection of 123 votes, majority of them said to have been cast in favour of the respondent. That apart, Section 176(4)(b) of the Act has also been amended. In terms of the amendment, only in those cases where clause (a) or clause (aa) would not apply, the provisions of clause (b) of the Act would be restored to. That apart, it also appears that the ground available under (aa) (iii) has also been available in Section 100 (a pari material provision), of the Representation of Peoples Act. Under the circumstances, we do not persuade ourselves to agree with the impugned order. And we hold that both the parties should be given adequate opportunity to lead evidence during the course of enquiry as contained in the provisions of Section 176(4)(a) of the Act. Accordingly, the impugned order is hereby set aside and the matter is remitted to the Tribunal for a fresh consideration. The Additional Civil Judge, Gohana, while acting as the Election Tribunal shall hold a complete enquiry after giving opportunities to both the parties and then record his findings within a period of two months from the receipt of a copy of this order.

Writ petition stands disposed of accordingly.

Learned counsel for the petitioner also challenged the order on the ground that no basis whatsoever, was shown in the petition to claim recounting. In support of his contention, reference was made to the averments made in the election petition filed by the election-petitioner-respondent No.2. The averments contained in paras 4 to 11 are reproduced which are as under:-

"4 That when the petitioner alongwith his counting agents reached the premises of Government Senior School for Boys, Umra on 4.4.2003 at about 3:00 P.M. he found that

many anti-social elements were present inside the counting hall. Even some advocates, who were not from village Umra, were also present inside the counting hall on behalf of the respondent. They were not even authorized as counting agents. It is pertinent to mention here that Shri Dungar Singh Dhull, Advocate and Shri Ramesh Dhull, Advocate, who belong to village Mundhal, Tehsil Hansi, District Hisar were present inside the counting hall without any authority of law. A known criminal of the area i.e. Abban, resident of Village Umra who has been convicted and sentenced for ten years under NDPS Act, 1985 was also present inside the counting hall on behalf of petitioner herein.

5. That sensing foul play by these persons, the petitioner made a complaint to the Returning Officer (Panchayat) i.e. Shri K.K.Gupta, SDO (Civil), Hansi in which he objected that Shri D.S.Dhull, Advocate etc. are not the counting agents and not residents of village Umra but no action was taken by the Returning Officer (Panchayat). They also made a similar complaint to the Assistant Returning Officer (Panchayat) in the counting hall itself on 4.4.2005 but he also did not pay any heed to the genuine request of the petitioner upon which the petitioner had no alternative but to come out. He did not participate in the recounting of votes.

6. That even in the evening of 3.4.2005, when first counting was completed and the petitioner was declared elected by one vote by the Assistant Returning Officer, the petitioner herein and his supporters did not allow the Assistant Returning Officer to declare the result of the counting and to issue the certificate to the petitioner. They closed the gates of the counting hall from inside and opened the same only after the Assistant Returning Officer obliged them that he shall not declare the result of the counting and the recounting shall be carried out on the next day.

7. That this conduct of the Assistant Returning Officer was in violation of the Haryana Panchayati Raj Election Rules, 1994. It is pertinent to mention here that as per Rule 69 of Haryana Panchayati Raj Election Rules, 1994, the ARO (Panchayat) was bound to announce the result of the counting but he did not do so at the spot in conspiracy and collusion with the petitioner herein and his counting agents.

8. That at the time of Ist counting, the petitioner had secured 1451 votes as per detail given by the ARO while the petitioner herein had secured 1450 votes. However, the ARO did not count about 50 valid votes in favour of the petitioner. He further included about 50 invalid votes in favour of petitioner herein in the first counting as well as in the recounting of votes.

9. That the conduct of the ARO (Panchayat) was published in various newspapers on 4.4.2005. Copy of the news items dated 4.4.2005 published in a National Newspaper is attached herewith.

10. That from the above facts and circumstances, it is crystal clear that the petitioner had secured more votes that the petitioner herein, therefore, the election of petitioner herein is liable to be set aside and he is liable to be declared as disqualified for the purpose of election. As a necessary corollary of this relief, the petitioner is entitled to be declared elected as Sarpanch of village Umra as he has secured/received largest number of valid votes in his favour.

11. That the petitioner is challenging the validity of the declaration of election of petitioner herein as Sarpanch on the ground that recounting of the votes polled in this election was not done correctly and as per rules 1994 mentioned above, therefore, it is in the interest of justice and fitness of things that this court may scrutinized and compute the votes recorded in favour of each candidate and declare the candidate who is found to have largest number

> of valid votes in his favour to have been duly elected as provided under section 176(4)(b) of the Haryana Panchayati Raj Act, 1994 and the petitioner undertakes to be bound by such scrutiny and computation of the votes held by this Hon'ble Court. The petitioner is making a separate application for scrutiny and computation of valid votes alongwith this election petition."

Learned counsel for the petitioner further placed reliance on the judgment of Hon'ble Supreme Court in case of **Chandrika Prasad Yadav vs. State of Bihar and others AIR 2004 Supreme Court 2036** to contend that the impugned order cannot be sustained as no sufficient explanation has been furnished in the election petition. In order to claim the recount. Para 26 of the said judgment reads as under:-

> "In a given case, an application for recounting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officer appointed for the counting the ballot papers, immediate, redressal of grievances would be possible. While filing such application the basis for making a request for recounting of votes is required to be disclosed. The Returning Officer is statutory enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of R.79(2) either accepting in whole or in part such requests or rejecting the same wherefore he is required to assign sufficient or cogent reasons. In the event, such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also.
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> It no sufficient explanation is furnished by the election petition as to why the statutory remedy provided was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for recounting. An order of the prescribed authority

> passed in such application would render great assistant to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for recounting has been made out.

Learned counsel for the petitioner further argues that the learned Tribunal has mis-applied the judgment of the Full Bench of this Court in the case of **Radha Kishan vs. The Election Tribunal-cum-Sub Judge, Hissar (P&H)(FB) 1999 (4) RCR 79** in ordering the recount without making out any ground for such an order.

Mr.Arun Jain, learned counsel for respondent No.2 on the other hand, supported the order passed by the Tribunal primarily on the ground that same in consonance with the law laid down by the Full Bench of this Court in the case of **Radha Kishan (supra)**. The contention of the learned counsel for the petitioner was that the Tribunal after having satisfied that there were sufficient grounds ordered recounting of the votes.

It was also contended that the order for recounting should not be interferred in the exercise of revisional jurisdiction under Section 227 of the Constitution of India. He made special reference to paras 42 of the judgment of Full Bench which reads as under:-

> "42. In the petition detailed circumstances were stated and the petition was duly verified. The petitioner Smt. Darshana on 18.5.1996, had given up all the grounds of corrupt practices or otherwise and had confined her relief and claim to the recount and scrutiny and computation of the valid votes. The learned Judge vide order dated 14.8.1996 had come to the conclusion that in order to do justice between the parties and on the basis of the averments made in the petition supported by documents, it would be imperative to direct recount/scrutiny and computation of valid votes. The order datged 14.8.1996 is a well reasoned order and we are of the considered view

that it fully satisfies and basic and under buying requirements of section 176(4)(b) of the Act.

Consequently, we also see no reason to interfere in the order dated 14.8.1996 challenged by Smt.Surjani.

Learned counsel appearing on behalf of election-petitioner/respondent No.2 also placed reliance on the judgment of Division Bench of this Court in the case of **Lillu Ram vs. The Additional Civil Judge (Sr.Divn.), Gurgaon and others 2007 (2) RCR (Civil) 323** to contend that once serious allegation against recount was made which was coupled with the news items/reports prima facie material existing for the Tribunal to firm an opinion that this ground was made for recount, therefore, order was validly passed.

Learned counsel further argued that mere fact that no request was made by him under Rule 69 for recounting, could not be a ground to non-suit the election petitioner-respondent No.2 and therefore, no benefit can be taken by the petitioner herein. In support of this contention, he made reference to the judgment of this Court in case of **Kartara v. Santosh Devi (P&H) 2006(4) RCR (Civil) 536** wherein by placing reliance on the judgment of the Supreme Court in the case of **Sohan Lal v. Babu Ganam and others (2002 (9) SC (JT) 474 : (2003) 1 SCC 108)**. This Court was pleased to hold that recounting could be allowed even in the absence of application moved under Section 69. Learned counsel also brought to the notice of this Court that same view has been taken by this Court in Civil Writ Petition No.4358 of 2004 **Sanjeev vs. Election Tribunal.** However, this point does not arise in the present case, as it is no body's case that recount could not be ordered for want of application under Rule 69.

After consideration of matter, I find force in this revision petition. The Division bench of this Court in the case of **Sanjeev** (**supra**) has been pleased to lay down that after aforesaid amendment of Section 176 before forming a prima facie opinion on the allegation levelled, an enquiry is to be held and it is thereafter, that a decision can be taken for ordering recount.

The allegation of the petitioner that there were certain irregularities or certain invalid votes which were counted and invalid votes which were not counted cannot be taken note of till the parties are allowed to lead evidence to prove these allegations.

After the allegations are excluded then we are left with the only question as to whether sufficient ground was made out by the respondent No.2 as envisaged under Section 176(4)(b) to claim recount of votes.

The Full Bench in case of **Radha Kishan** (supra) has been pleased to lay down that recount only can be ordered if prima facie material is placed on record and a ground is made out for recounting. However the reading of the election petition shows that no ground whatsoever, was made out. The election petition is filed on the pleadings that order of recount passed by the Assistant Returning Officer (Acting) was not in consonance with law and that the petitioner deserves to be declared elected on the basis of counting done on 3.4.2005.

This plea of the election-petitioner can only be accepted or rejected after the parties are permitted to lead evidence and therefore, the reliance placed by the learned counsel for the election-petitioner-respondent No.2 on the judgment of this Court in **Radha Kishan (supra)** is of no help to respondent no.2 in the present case.

The Hon'ble Supreme Court in the case of **Chandrika Prasad Yadav (supra)** has laid down that sufficient ground has to be made out in the

election petition before recounting can be ordered, though the said judgment has been distinguished by this court. However, law laid down by Hon'ble Supreme Court that sufficient ground was to be made in election petition before recount can be ordered is approved by the Full Bench as well Division Bench of this Court have taken consistent view that recounting can be ordered only on the basis of sufficient material placed on record.

In absence of any material whatsoever to claim recount, the Tribunal was not justified in ordering the recount, merely on the application and statement made by the counsel that he does not press any ground except one under Section 174(b) of the Act. Consequently, petition is allowed and the impugned order is set aside.

In view of the fact that the order passed by the Tribunal has been set aside by this Court, now the Tribunal is ordered to decide the election petition on merit after permitting the parties to lead evidence.

[**Vinod K.Sharma**]

Judge

03.10.2007

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